IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1904.—No. 44.

THE SAN FRANCISCO NATIONAL BANK (A NATIONAL BANKING ASSOCIATION), *Appellant,*

vs.

WASHINGTON DODGE, AS ASSESSOR OF THE CITY AND COUNTY OF SAN FRANCISCO, STATE OF CALIFORNIA, *Appellee.*

BRIEF FOR APPELLEE.

Between the first Mondays in March and July, 1900, the Assessor of the City and County of San Francisco proceeded to and did assess, for purposes of taxation, the shares of stock of all national banks having their principal place of business in said City and County. This assessment was made under and in virtue of the provisions of an Act of the Legislature of the State of California, in effect March 14, 1899, amending section

3608 of the Political Code of that State, and adding sections 3609 and 3610 thereto, all relating to property liable to taxation for purposes of revenue. (Stats. 1899, p. 96.) The purpose of this act is served when an assessment and taxation of national bank shares is secured at a rate not greater "than is made or assessed upon " other moneyed capital in the hands of individual citi- " zens of this State."

The case of *The Nevada National Bank* v. *Dodge,* 119 Fed. Rep. 57, presented the same questions to the United States Circuit Court of Appeals for the Ninth Circuit as are presented to this Court on this appeal, with the result that the judgment of the Circuit Court was affirmed in an able opinion expressive of the unanimous views of the Court of Appeals. The Solicitor for the Nevada National Bank, being satisfied that the views expressed in that opinion were consonant with law and would receive the indorsement and affirmance of this Court should an appeal be prosecuted therefrom, elected to abide by the result and no appeal was taken in that case. Subsequently the appeal of the San Francisco National Bank was presented to the Circuit Court of Appeals and the judgment of the Circuit Court, from which it was prosecuted, was affirmed on the authority of *Nevada National Bank* v. *Dodge,* 119 Fed. Rep. 57, with which case it was identical in point of law, and of which it was a companion case.

A review of the legislative and judicial history of the attempts of the State of California to subject the

shares of stock of national banks, having their principal places of business in this State, to assessment and taxation, would be full of legal interest. Up to the passage of the Act of 1899 these attempts have been uniformly unsuccessful. It is believed that, in that act, the State has complied with all the limitations imposed by the Congress, and has honestly and fairly provided a system through which justice will be done the banks and the banks will be required to do justice to the State and her taxpayers. It is upon the validity of this act, considered in the light of Federal and State limitation, that this appeal must come to depend. And upon that test rests the right of a sovereign State to subject to their just share of the burdens of her government, the wealth within her limits invested in national bank stock. Congress has recognized the justice of requiring such property to bear its proper proportion of such burden, not alone that the Government of the State may be thereby sustained, but equally that no Federal agency shall be introduced into the commercial life of a State, free from the obligations which are imposed by the necessity of sustaining that Government upon her own banks and bankers. While it is important that no national bank should be the object of unjust discrimination at the instance of the State, it is equally essential that no State bank should be so subjected.

"All that has ever been held to be necessary is, that "the system of State taxation of its own citizens, of its

"own banks, and of its own corporations shall not make "a discrimination unfavorable to the holders of the "shares of national banks. Nor does the act of Con- "gress require anything more than this; neither its "language nor its purpose can be construed to go any "further. Within these limits the manner of assessing "and collecting all taxes by the States is uncontrolled "by the act of Congress."

Davenport Bank v. *Davenport,* 123 U. S. 84;
Mercantile Bank v. *New York,* 121 U. S. 138.

In so much as the exemption of one class of property must increase the burden to be borne by that which remains to be taxed, it is unjust to all other classes of property that any should be allowed to escape taxation. Every intendment, therefore, should be indulged in support of a law which bears upon its face evidence of a sincere desire to avoid discrimination, and to deal fairly with the national banks and their shareholders. While the right of every citizen to resist an unjust or excessive tax must be cheerfully conceded, the practical workings of an intricate svstem of taxation do not admit of that nicety of adjustment which will relieve all individual hardship or produce absolute uniformity of assessment.

"The most that can be expected from wise legisla- "tion is an approximation to the desirable end, and "the requirement of equality and uniformity found in "the Constitutions of some of the States is complied "with, when designed and manifest departures from "the rule are avoided."

Stanley v. *Supervisors,* 121 U. S. 550.

The determination of the questions here involved invites a high and broad minded view of the issues presented commensurate with the dignity and importance of the subjects to which they relate.

I.

CONSTITUTIONALITY OF THE ACT OF MARCH 14, 1899.

We pass to a consideration of the constitutionality of the Act of March 14, 1899, wherein serious questions press for determination. What solicitor for appellant has said, in definition of the power of the State to exercise the power of taxation, may be conceded. Whether the State possesses an inherent power as a necessary attribute of her sovereignty to tax all property within her limits, irrespective of the uses to which it may be put, until such power is restricted or limited by express Act of Congress, is immaterial in this inquiry. Whether section 5219 of the Revised Statutes be considered a limitation upon the taxing power of the State, or a grant to the State, of power to tax the shares of national banks, the all-important fact remains that the power to tax the shares of stock of national banks was conceded to the States by Act of Congress in section 5219 of the Revised Statutes.

By that section the power is confirmed in the State to "include in the valuation of the personal property of " the owner or holder of such shares" all shares in any national banking association; and it is expressly declared:

"But the Legislature of each State may determine " and direct the manner and place of taxing all the " shares of national banking associations located within " the State, subject only to the restrictions that the tax- " ation shall not be a greater rate than is assessed upon " other moneyed capital in the hands of individual citi- " zens of such States, and that the shares of any national " banking association owned by non-residents of any " State shall be taxed in the city or town where the " bank is located, and not elsewhere."

Subject to the two restrictions noted, the power of the State to tax the shares of capital stock of national banks is as great as its power to tax any other species of property found within the taxing jurisdiction, and such power is unlimited.

"Unless restrained by provisions of the Federal Con- " stitution, the power of the State as to the mode, form " and extent of taxation is unlimited, where the sub- " jects to which it applies are within the jurisdiction."

State Tax on Foreign Held Bonds, 15 Wall. 334;
Kirtland v. *Hotchkiss,* 100 U. S. 491;
Mackay v. *S. F.,* 113 Cal. 392.

And the Act of Congress recognizes this rule by declaring, "that the Legislature of each State may direct " and determine the manner and place of taxing all the " shares of national banking associations located within " the State."

Uniformity of Assessment.

We find, that, in consequence of this power in the State, the questions presented most frequently for de-

termination in connection with its exercise concern the force and effect of the two restrictions imposed by Congress; and, as the requirement, that the shares of non-residents shall be taxed at the locality in which the bank is situated, is unambiguous and easily complied with, the great volume of litigation has to do with the interpretation of the first restriction: "that the taxation shall "not be at a greater rate than is assessed upon other "moneyed capital in the hands of individual citizens "of such State."

At the outset it may be conceded that the requirement that taxation shall not be "at a greater rate" means that the assessment, as well as the amount levied in proportion to the assessment, shall not be at a greater rate.

And by that concession we do not desire to be understood as conceding that each individual variation, between assessment of national bank shares and other taxable property, would constitute a ground for successful assault upon the assessment. Individual variations are unavoidably incident to every system of taxation, are so recognized by the Courts, and are condoned accordingly. It is only under a state of facts which discloses a preconcerted understanding on the part of the Assessor, or as a result of operations of the State statute, to discriminate against the shares of national banks, that the courts will declare an assessment void on that ground.

As the Supreme Court says, in *Stanley* v. *Supervisors,* 121 U. S. 550:

"Absolute equality and uniformity are seldom, if "ever, attainable; the diversity of human judgments, "and the uncertainty attending the human evidence, "preclude the possibility of this attainment. Intelli- "gent men differ as to the value of most common things "before them—of animals, houses and lands in con- "stant use. The most that can be expected from wise "legislation is an approximation to the desirable end; "and the requirement of equality and uniformity found "in the Constitutions of some of the States is complied "with, when designed and manifest departures from "the rule are avoided."

And it is accordingly the rule that Courts will not interfere with an assessment of property at its full value, on the ground of inequality resulting from the assessment of other property at less than its full value, unless it appears that the assessing officers, whose acts of under-valuation create the discrimination, intentionally and habitually violate the law by assessing property at less than its true value.

Bank v. *Kimball,* 103 U. S. 722;
Supervisors v. *Stanley,* 105 U. S. 305;
Bank v. *Perea,* 147 U. S. 67.

"Other Moneyed Capital."

There is another settled construction upon which it may be possible to agree. The term "other moneyed "capital," as used in this section, has received what

may be considered a settled interpretation, in the light of which the consideration of this case should proceed.

In the very recent case of *National Bank* v. *Mayor, etc., of Baltimore,* 100 Fed. 29, the Circuit Court of Appeals for the Fourth Circuit says:

"The words 'moneyed capital' not having been de-
" fined by the statute, it has been left to the courts to
" interpret them, and they have been so frequently con-
" sidered by the Supreme Court of the United States
" that there is little difficulty in ascertaining what that
" Court construes them to mean. The leading case is
" *Mercantile Nat. Bank* v. *City of New York,* 121
" U. S. 157, and the last case is *First National Bank of*
" *Aberdeen* v. *Chehalis Co.,* 166 U. S. 440. In these
" two cases will be found a review of nearly all the
" decisions. It would serve no good purpose to restate
" them. The result of them all is that 'money capital'
" has been given a restricted meaning. It is the nature
" of the employment that fixes its character. * * *

"The policy and purpose of Congress was to protect
" the instrumentalities created by it from unfair com-
" petition, by requiring that all persons engaged in like
" business should pay upon the capital so employed a
" like and equal rate of taxation. *The true test* is the
" nature of the business in which the person is engaged,
" and that cannot be determined by the character of the
" investment. Moneyed capital does not mean all
" capital the value of which is measured in terms of
" money."

In short, only competing "moneyed capital" is required to be assessed at no less a rate than shares of stock of national banks.

Mercantile Bk. v. *New York,* 121 U. S. 154-7;
Evansville Bank v. *Britton,* 105 U. S. 322;
National Bank v. *Chehalis,* 166 U. S. 440.

The questions are so far narrowed, therefore, as to be confined to the inquiry whether the revenue laws of California, as found in its Constitution and statutes, including the Act of March 14, 1899, assume to impose a greater rate of taxation upon the shares of national banks than they impose upon other competing "moneyed capital."

We say this is the scope of the inquiry on this part of the case, for the reason that it is not alleged, nor is it a fact, that appellee has intentionally or unintentionally, discriminated against such shares, or that he has discriminated at all, other than by such discrimination as, it is alleged, will result from the revenue laws of the State. On the contrary, the appellant has deducted from the properties of the banks, which are legally elements in the estimation and determination of the value of its shares, the United States bonds held by such banks, although it was early declared by the United States Supreme Court that it was competent to include such bonds in the estimation of the value of the shares.

Van Allen v. *Assessors,* 3 Wall. 573;
Bradley v. *People,* 4 Wall. 459;
People v. *Commissioners,* 4 Wall. 244.

Statement of the Concrete Question.

We reiterate, therefore, the question is, on this branch of the case, whether the Constitution and laws of the State of California do, on their face, discriminate against national bank shares in their assessment and the assessment of other competitive moneyed capital.

And at the opening of this inquiry, the syllabus of the Supreme Court of the United States, in *Davenport Bank* v. *Davenport,* 123 U. S. 83, may be quoted with profit:

"Section 5219, Revised Statutes, respecting the taxa-
" tion of national banks, does not require perfect equal-
" ity between State and national banks, but only that
" the system of taxation in a State shall not work a dis-
" crimination favorable to its own citizens and corpora-
" tions, and unfavorable to the holders of shares of
" national banks. If a State statute creating a system of
" taxation does not, on its face, discriminate against
" national banks, and there is neither evidence of legis-
" lative intent to make such discrimination, nor proof
" that the statute works an actual and material discrim-
" ination, there is no case for holding it to be unconsti-
" tutional."

It will hardly be contended that this Act of 1899 discloses on its face any hostile legislative intent, so far as permitting such deductions from national bank stock as are permitted to other moneyed capital.

On the contrary, in the enactment of the Act of March 14, 1899, the Legislature of the State repeatedly emphasized its intent that no discrimination should

be made against the holders of national bank shares. Thus it is provided in the act (sec. 3609):

"And the assessment and taxation of such shares of "stock in said national banking associations shall not "be at a greater rate than is made or assessed upon "other moneyed capital in the hands of individual citi- "zens of this State."

And again, in the same section, it is provided: "and "said shares shall be valued and assessed as is other "property for taxation."

The only discrimination on the face of the statute, if that be a discrimination, is in the exemption of shares of stock of other corporations from assessment.

With this in mind let us consider the revenue system of California, with particular reference to the validity of the Act of March 14, 1899.

The statute is attacked on several grounds, the *first* and perhaps the most important of which, is, that no deduction can lawfully be allowed to the owners of national bank stock for unsecured debts owing by them to *bona fide* residents, while such a deduction is permitted and required to be made from solvent credits unsecured; and, *second,* that no assessment of the shares of national bank stock can be made while the State law (Sec. 3608, Pol. Code) exempts, *eo nomine,* shares of stock in certain other corporations from assessment and taxation.

We will discuss these questions in their order.

A.

Is a Deduction Allowed to the Owners of National Bank Stock from the Value of their Stock of Debts Owing by them to Bona Fide Residents of the State?

This contention, as insisted upon by appellant, involves the validity of that portion of the Act of 1899 which provides for such deduction. Section 3609, Political Code, as found in that Act, provides:

"But in the assessment of such shares, each stock-
" holder shall be allowed all the deductions permitted
" by law to the holders of moneyed capital in the form
" of solvent credits, in the same manner as such deduc-
" tions are allowed by the provisions of paragraph six
" of section thirty-six hundred and twenty-nine of the
" Political Code of the State of California. * * *
" And the assessment and taxation of such shares of
" stock in said national banking association shall not be
" at a greater rate than is made or assessed upon other
" moneyed capital in the hands of individual citizens of
" this State."

The attitude of appellant is, not that the Act has failed to make provision for the deduction which it claims, and which the Assessor alleges he is prepared to grant, but that the clause of the statute permitting such deduction is unconstitutional and void.

Sec. 1, Art. XIII, Const. of Cal.

In the first place, the provision which is attacked as being void is obviously designed for the benefit of complainant's stockholders, and is in conformity with ap-

pellant's construction of the Act of Congress requiring that such shares shall not be assessed at a greater rate than is assessed upon other moneyed capital. The Act of the Legislature gives it such right, but it complains that it has been given it by the statute, and not by the Constitution. Can it be heard to complain because a right is accorded him of which he will be permitted to take advantage, and which brings this portion of the statute unquestionably within the provisions of the only act which affords him protection? What beneficial interest has complainant in avoiding a portion of a statute which was designed for its benefit?

And even if this Act of 1899 had contained no such provision, would it result therefrom that it would be void?

This question was answered by the Supreme Court of the United States in *Supervisors* v. *Stanley,* 105 U. S. 305-311, as follows:

"Accepting, therefore, as we must, the Act of 1866, " as construed by the Court of Appeals of New York, " as not authorizing any deduction for debts by a stock- " holder of a national bank, is it, for that reason, void? " This cannot be true in its full sense, for there is no " reason why it should not remain the law as to banks " or banking associations organized under the laws of " the State, or as to private bankers, of which there no " doubt exists a large number of both classes.

"What is there to render it void as to a stockholder in " a national bank who owes no debts which he can " deduct from the assessed value of his shares? The " denial of this right does not affect him. He pays the

"same amount of tax that he would if the law gave him "the right of deduction. He would be in no better "condition if the law expressly authorized him to "make the deduction. What legal interest has he in "a question which only affects others? Why should he "invoke the protection of an Act of Congress in a case "where he has no right to protect? Is a Court to sit "and decide abstract questions of law in which the "parties before it show no interest, and which, if de-"cided either way, affect no right of theirs?

"It would seem that if the Act remains a valid rule "of assessment for shares of State banks and for indi-"vidual bankers, it should also remain the rule for "shareholders of national banks who have no debts to "deduct, and who could not, therefore, deduct any-"thing if the statute conformed to the requirements of "the Act of Congress."

And again, in the same case, after reviewing a number of authorities, the Court says (page 315):

"It follows that the Assessors were not without au-"thority to assess national bank shares; that where no "debts of the owners existed to be deducted the assess-"ment was valid, and the tax paid under it a valid tax. "That in cases where there did exist such indebtedness, "which ought to be deducted, the assessment was *void-*"*able* but not void. The assessing officers acted within "their authority in such cases until they were notified "in some proper manner that the shareholders owed "just debts which he was entitled to have deducted."

This case has been affirmed in *Palmer* v. *McMahon*, 133 U. S. 667.

If, therefore, appellant can be heard to complain of a provision in the law favorable to its shareholders, and

of which the appellee alleges his intention of giving it the full benefit, and its contention that this beneficial provision of the statute is void in so far as it denies such deduction, where the shareholders are entitled to it, is sustained, it by no means follows that the Assessor is without power to make such assesment, or that the assessment, when made, would be anything more than voidable; on the contrary, it would not be either void or voidable until a showing was made and sustained that the shareholders were indebted, in unsecured debts, to *bona fide* residents of the State.

Such an assessment, made in the presence of a showing that the stockholder was so indebted, and had complied with the provisions of the law entitling him to such deduction, would disclose a voidable assessment as to such stockholder. But, as to all other stockholders who fail to avail themselves of the deduction, the assessment would be perfectly good.

But that would indeed be a peculiar principle, which would permit a complainant to enter a Court of equity for the purpose of claiming the protection of the Act of Congress, and under cover of such pretense to permit it to attack the features of a State law designed for its benefit, and in conformity with that Act.

The right, however, to enjoy that deduction from solvent credits of debts due to *bona fide* residents is not without its conditions. The Constitution of California has not conferred that right, but has simply provided:

"The Legislature *may* provide, except in the case of "credits secured by mortgage or trust deed, for a de-

" duction from credits of debts due to *bona fide* resi-
" dents of this State."

Sec. 1, Art. XIII, California Constitution.

This section is not self-executing, and it remained for the Legislature to make provision for such a reduction before it was available to the taxpayer. This provision was made in virtue of the provisions of section 3629, subdivision 6, of the Political Code. In defining what property shall be separately stated in the statement of the taxpayer, it is provided therein, with respect to solvent credits:

"6. All solvent credits, unsecured by deed of trust, " mortgage, or other lien on real or personal property, " due or owing by such person, or any firm of which " he is a member, or due or owing to any corporation " of which he is president, secretary, cashier, or man- " aging agent, deducting from the sum total of such " credits such debts only, unsecured by trust deed, mort- " gage, or other lien on real or personal property, as " may be owing by such person, firm or corporation, " to *bona fide* residents of this State. *No debt shall be* " *deducted unless the statement shows the amount of* " *such debt as stated under oath in aggregate; provided,* " *in case of banks the statement is not required to show* " *the debt in detail, or to whom it is owing;* but the " Assessor shall have the privilege of examining the " books of such banks to verify said statement."

Appellant would be entitled to a deduction, on account of debt due *bona fide* residents of California, from the value of its stock in any event, *only* after the condition here expressed in the statute granting such

right to all taxpayers had been complied with. No debt shall be so deducted unless the bank shall return, in its statement of property, the amount of debts due to such *bona fide* residents. Such debts need not be stated in detail, but a statement of the amount for the deduction of which the claim is asserted, must be made.

There is no showing here that any such statement has been made; that any such deduction has been demanded, or that any such indebtedness exists. On the contrary, appellant agrees (Record, pp. 83, 84) that no such statement was made or returned in accordance with section 3629 of the Political Code, or otherwise.

This brings appellant's case clearly within the rule laid down by the Supreme Court that, where a condition is imposed on the enjoyment of a right, such condition must be complied with before the right can be enforced.

Conceding, however, for the present, that that portion of the Act of March 14, 1899, which provides for the deduction from national bank stock of unsecured debts due *bona fide* residents, is in conflict with section 1, article XIII, of the Constitution of the State, it by no means follows that the Act is not enforceable; or that an assessment made in conformity with its remaining provisions would discriminate against the owners of national bank shares; or that such shares would be assessed at a greater rate than is or will be assessed upon the moneyed capital in competition therewith.

B.

An Assessment of the Shares is an Assessment of the Net Assets of the Corporation.

If, in the assessment of shares of stock, the value of such shares represents the difference between the gross assets of the bank and its liabilities, other than secured credits, it follows that such an assessment is the equivalent of an assessment of the assets of the banks minus its unsecured liabilities. If this be so, the method of assessment, required by Act of Congress, has been followed, by an assessment of the shares of stock without permitting a deduction from such shares of unsecured debts. To allow such deduction to the shareholder would be to allow a double deduction from such credits—once for the unsecured debts of the bank, and second, for the unsecured debts of the shareholders. This is manifestly not required by the Act of Congress, the requirements of which are met when an equal deduction is made, and which does not require that there should be any discrimination *in favor* of national bank shares.

A contention almost identical with the one now under discussion reached the Supreme Court of the United States in *National Bank of Wellington* v. *Chapman,* 173 U. S. 211, a case in which the revenue laws of Ohio allowed a deduction of debts from credits, but denied it to the holders of shares of stock. The position is stated thus in the opinion:

"The complaint is founded upon the allegation that "the owners of what is termed credits in the law of "Ohio (Rev. Stats., par. 2730) are permitted to de- "duct certain kinds of their debts from the total "amount of their credits, and such owners are assessed "upon the balance only, while no such right is given "to owners of shares in national banks. The claim is "that shares in national banks should be treated the "same as credits, and their owners permitted to deduct "their debts from the valuation. The owners of prop- "erty other than credits are not permitted to deduct "their debts from the valuation of that property." (P. 213.)

This would appear to be a case almost identical in fact and principle with the case at bar.

The Court said (p. 215):

"Under the Ohio law the shares in national and also "in State banks are what is termed stocks or invest- "ments in stocks, and are not credits from which debts "can be deducted. As between the holders of shares in "incorporated State banks and national banks on the "one hand, and unincorporated banks or bankers on "the other, we find no evidence of discrimination in "favor of unincorporated banks or bankers. In re- "gard to this latter class, there is no capital stock, so "called, and section 2759 of the Revised Statutes there- "fore makes provision, in order to determine the "amount to be assessed for taxation, for deducting the "debts existing in the business itself from the amount "of moneyed capital belonging to the bank or banker "and employed in the business, and the remainder is "entered on the tax book in the name of the bank or

" banker, and taxes assessed thereon. This does not " give the unincorporated bank or banker the right to " deduct his general debts disconnected from the busi- " ness of banking, and not incurred therein, from the " remainder above mentioned. It cannot be doubted " that under this section those debts which are discon- " nected from the banking business cannot be deducted " from the aggregate amount of the capital employed " therein. The debts that are incurred in the actual " conduct of the business are deducted so that the real " value of the capital that is employed may be deter- " mined and the taxes assessed thereon.

"This system is, as nearly as may be, equivalent in " its results to that employed in the case of incorporated " State banks. Under the sections of the Revised Stat- " utes which relate to the taxation of these latter classes " of banks (sec. 2762, etc.), the shares are to be listed " by the auditor at their true value in money, *which* " *necessarily demands the deduction of the debts of the* " *bank, because the true value of the shares in money is* " *necessarily reduced by an amount corresponding to* " *the amount of such debts.* In order to arrive at their " true value in money the bank returns to the auditor " the amount of its liabilities as well as its resources. " Thus in both incorporated or unincorporated banks " the same thing is desired, and the same result of as- " sessing the value of the capital employed in the busi- " ness, after the deduction of debts incurred in its " conduct, is arrived at in each case as nearly as is pos- " sible, considering the difference in manner in which " the moneyed capital is represented in unincorporated " banks as compared with incorporated banks which " have a capital stock divided into shares. That mathe-

" matical equality is not arrived at in the process is " immaterial. It can not be reached in any system of " taxation, and it is useless and idle to attempt it. Equal- " ity, as far as the differing facts will permit, and as " near as they will permit, is all that can be aimed at " or reached. That measure of equality, we think, is " reached under this system. So far as this point is " concerned, it is entirely plain that there is no dis- " crimination between unincorporated banks and bank- " ers on the one hand and the holders of shares of stock " in national banks on the other."

In this connection, we quote from *Bressler* v. *Wayne Co.*, 32 Neb. 834.

This case involved the right of a holder of national bank shares to deduct his *bona fide* debts in listing his shares for taxation.

In the opinion the leading cases of the United States Supreme Court, on the questions of deductions and exemptions, are considered and the former doctrine of the State Court overruled.

"The fact that the unincorporated bank is entitled " to such deduction is no valid reason why the debts of " the owner of national bank stock should be deducted " from the value of his shares in assessing them. Na- " tional banks are assessed solely by taxing the shares " of stock. In unincorporated banks there are no " shares of stock to tax, and the Legislature, of neces- " sity, was compelled to adopt a different method of " taxing them by assessing the value of the capital " therein invested, which is practically the difference " between the value of the assets and the amount of " liabilities. *The shares of a national bank do not rep-*

" *resent the assets of the bank, but rather the difference*
" *between the value of its property and its liabilities.*
" While the method of assessing national banks is dif-
" ferent from that by which a private bank or banker is
" assessed, the rule of uniformity is preserved, so that
" it cannot be said that the law of the State requires that
" national banks shall be taxed at a greater rate than is
" imposed upon the capital invested in the State banks."

In *Chapman* v. *Bank of Wellington,* 56 Ohio, 310, affirmed in *National Bank of Wellington* v. *Chapman,* 173 U. S. 205, the Court, in considering section 2762, Revised Statutes of Ohio, providing that shares of stockholders in incorporated banks, whether State or national, shall be "listed at their true value in money" (p. 328), holds that, in fixing the true value of the shares in money, the bank deducts its debts from its credits, so that it pays taxes only on its net valuation. Unincorporated banks are taxed in the same manner by deducting debts from credits, so as to pay only on the net capital stock. By section 2759 of the laws of Ohio, in the case of incorporated State banks, after the deduction of debts from credits is made, and the net value of each share of stock thus ascertained, the holder of such stock is compelled to pay taxes upon such value, and is not permitted to deduct his legal *bona fide* debts therefrom. In the case of the unincorporated banks, when the net value of the capital is ascertained, the bank pays the tax thereon, and the several owners of the capital are not allowed to deduct any of their individual debts from their shares of such capital. It is

thus clear that moneyed capital invested in national banks is placed upon an exact equality with moneyed capital invested in State banks, and this is all that can be reasonably asked for national banks.

"To place the holder of national bank shares into the "class of bankers, and treat his shares as stocks until "the net value is fixed, and then change his stock into "credits and take him out of the class of bankers and "place him into the class of private individuals, so as "to enable him still further to reduce his stock thus "changed into a credit, by deducting therefrom his "legal *bona fide* debts, would be discriminating in "favor of such national bank shareholder, and would "be giving him two chances to escape taxation while "other bankers and private individuals have but one.

"We think that national bank shares belong to the "class known as stocks, and not to the class known as "credits, and that such shares cannot have the double "advantage of both stock and credits; and that the "holders of such shares have no right under the stat-"utes, State and national, to deduct their legal *bona* "*fide* debts from the assessment value of such shares."

And in *Van Allen* v. *Assessor,* 3 Wall, *supra,* where it is held that national bank shares are taxable in the hands of the owner, regardless of the fact that part or whole of the capital of the bank is exempt from taxation, the Court, in considering the relation of the shares of stock to the property possessed by the bank, says:

"The corporation is the legal owner of all the prop-"erty of the bank, real and personal; and within the "powers conferred upon it by charter and for the pur-

" poses for which it is created, can deal with the cor-
" porate property as absolutely as a private individual
" can deal with his own. * * * The interest of the
" shareholder entitles him to participate in the net
" profits earned by the bank in the employment of its
" capital, during the existence of its charter, in propor-
" tion to the number of his shares; and upon its disso-
" lution or termination, to his proportion of the
" property that may remain after the payment of its
" debts."

The general rule is that a share of stock is a right to a proportionate part in the dividends and profits of the corporation and to a share of its net assets upon dissolution.

That the shareholder is entitled to a part only of the net assets, or assets remaining after the payment of debts, is supported by these cases:

Plumpton v. *Bigelow*, 93 N. Y. 599;
Field v. *Pierce*, 102 Mass. 261;
Jones v. Davis, 35 Ohio, 477;
Tax Collector v. *Insurance Co.*, 42 La. Ann. 1172;
Farrington v. *Tennessee*, 95 U. S. 687;
People v. *Bank of D. O. Mills*, 123 Cal. 60.

C.

No Solvent Credits Escape Assessment Under the Constitution and Laws of the State of California.

It is the declaration of section 1, article XIIII, of the Constitution of this State that:

"All property in the State not exempt under the laws
" of the United States shall be taxed in proportion to

"its value to be ascertained as provided by law. The "word 'property,' as used in this article and section, is "hereby declared to include moneys, *credits, stocks,* "dues, *franchises,* and all other matters and things, "real, personal and mixed, capable of private owner- "ship. * * * The Legislature may provide, ex- "cept in case of credits secured by mortgage or trust "deed, for a deduction from credits of debts due to "*bona fide* residents of this State."

Sec. 3607, Pol. Code.

And section 3617, Political Code, defines credits as follows:

"The term 'credits' means those solvent debts not "secured by mortgage or trust deed, owing to the per- "son, firm, corporation, or association *assessed.* The "term 'debts' means those unsecured liabilities owing "by the person, firm, corporation or association *assessed* "*to bona fide residents of this State,* or firms, associa- "tions, or corporations doing business therein; but "credits, claims, debts and demands due, owing or ac- "cruing for or on account of money deposited with sav- "ings and loan corporations shall, for the purpose of "taxation be deemed and treated as an interest in the "property of such corporations, and shall not be as- "sessed to the creditor or owner thereof."

It is to be noted, therefore, that the permission to deduct unsecured debts from solvent credits unsecured does not relieve any portion of the wealth of the State from taxation, but simply contemplates the assessment and taxation of such debts so deducted in the hands of and as so much property belonging to the creditor. *All credits are assessed.*

This plan of taxation finds its basis in the opinion of the Supreme Court of the United States in State Tax on Foreign Held Bonds, 15 Wall. 324, where it is said:

"But debts owing by corporations, like debts owing "by individuals, are not property of the debtors in any "sense; they are obligations of the debtors, and only "possess value in the hands of creditors. With them "they are property, and in their hands they may be "taxed. To call debts property of the debtors is simply "to misuse terms. All the property there can be in "the nature of things in debts of corporations belongs "to the creditors to whom they are payable, and fol- "low their domicile, wherever they may be."

And it is to be further noticed that not all unsecured debts are deductible from the solvent credits, unsecured, of the debtor. *Only such unsecured debts can be deducted as are owing to bona fide residents of the State.* Such debts owing abroad are not deductible, because they are not subject to the taxing jurisdiction of California in the hands of the creditor.

The Supreme Court of the State, in *People* v. *Hibernia Bank,* 51 Cal. 247, adopted an interpretation of the taxing system of the State, in which it was held that the taxation of credits and of the other property of the State must result in double taxation. The Court says:

"It may not be possible in every case to show that the "debtor has paid the tax assessed to the creditor. But "it admits of mathematical demonstration—if other "property in the State has been assessed at its value— "that the money which shall ultimately satisfy the debt "(if it is ever satisfied) has paid the tax. If it were

" possible to assess all the property in the State at the " same moment of time, it would be clear to every mind " that an assessment of a credit was an attempt to trans- " fer to it value elsewhere assessed. * * * But if " the debtor is found to be the owner of one thousand " dollars, and is assessed for that sum, and his creditor " is found to be the owner of his note for one thousand " dollars, and is assessed for a like sum; and if, the day " after the visit of the Assessor to the creditor, the " debtor shall pay his note, it is clear that the same " value has been twice taxed," etc.

For the purpose of conforming the revenue system of the State to the reasoning of this decision, a constitutional convention was called in which provision was made for the assessment of credits, after the deduction from their value of the liabilities assessable to the creditors.

It follows, therefore, that no moneyed capital in the form of credits escapes taxation under the tax laws of this State.

The debts, though deducted, are assessed to the creditors—in whose hands only are they property, and as such taxable.

While, therefore, a deduction is so allowed, it is a deduction of such unsecured debts only as are assessable or assessed to *bona fide* residents of the State.

Those liabilities which are debts of the debtor are also credits of the creditor, and it is the contemplation and purpose of the law that such liabilities shall be assessed and taxed in the hands of owners thereof.

Under our theory of taxation, as considered and de-

fined in *People* v. *Hibernia Bank,* 51 Cal. 243, and accepted by constitutional amendment, the debtor pays the tax. If this doctrine is sound, it follows that, while such deduction is permitted, the tax nevertheless falls upon the debtor.

The conclusion on this branch of the question must be that the holders of national bank stock are not entitled to deduction from the valuation of their stock of unsecured debts due to *bona fide* residents.

D.

Does the Exemption of Shares of State Banks Discriminate Against National Banks?

It is the further contention of appellant that the Act of March 14, 1899, imposes a greater rate of taxation upon the shares of national banks than is imposed upon other moneyed capital, in this: that the shares of stock in corporations organized and existing under the laws of the State, and having their corporate property therein, are exempt from taxation *eo nomine.*

Before entering upon a full discussion of this contention it may not be *mal apropos* to revert to the rule of law governing the interpretation of State statutes, under which the Federal Courts are held to the interpretation placed upon such statutes by the State Court. No citation of authorities is necessary to support the rule, which is also cited and relied upon by appellant.

As hereinbefore quoted, section 1, article XIII, of the Constitution, requires the taxation of *all* property

in the State, and defines the term "property" to include "stocks."

The question was early called to the attention of the State Supreme Court, whether, under this section, it was possible to tax the entire corporate property of the corporation, and also its shares of stock, at their actual value, without violating the provision against *double* taxation. It was insisted that to tax the entire corporate property and also the shares, would be double taxation. This question was passed upon in *Burke* v. *Badlam,* 57 Cal. 601, where the Court, in an opinion by Mr. Justice Ross, says:

"To assess all of the corporate property of the cor-
" poration and also to assess to each of the stockholders
" the number of shares held by him, would, it is mani-
" fest, be assessing the same property twice, once in the
" aggregate to the corporation, the trustees of all the
" stockholders, and again separately to the individual
" stockholders in proportion to the number of shares
" held by each."

The theory upon which this holding is based, is that the assessment of the stock of a corporation to the stockholders and the assessment of the property of the corporation to the corporation, would be an assessment of the same property twice; that the stock has no intrinsic value, over and above the value of the property of the corporation which it stands for and represents. As we have seen already, the assessment of the stock of a corporation, at its actual value, is simply the assessment of the net assets of the corporation. The stocks, there-

fore, under the California system of assessment, as interpreted by her own Courts, stand for and represent the property of the corporation; and an assessment of the property is equivalent, in law, to an assessment of the stock. This view is well illustrated by the subsequent holding in *San Francisco* v. *Fry,* 63 Cal. 470, to the effect that, where the property of a corporation was situated without the State, and could not be assessed by the State, that double taxation was not possible, and *the stock should be assessed.*

Stanford v. *San Francisco,* 131 Cal. 34.

The decision in *Burke* v. *Badlam, supra,* was accepted by the Legislature as a correct exposition of the laws of the State, and the principle therein established was incorporated in the laws of the State (sec. 3608, Pol. Code) as follows:

"Sec. 3608. Shares of stock in corporations possess "no intrinsic value over and above the actual value of "the property of the incorporation which they stand "for and represent; and the assessment and taxation of "such shares, and also the corporate property, would "be double taxation. Therefore, all property belong-"ing to corporations shall be assessed and taxed. But "no assessment shall be made of shares of stock in any "corporation, save and except in national banking as-"sociations, whose property other than real estate is "exempt from assessment by federal statutes."

S. V. W. W. v. *Schottler,* 62 Cal. 115;

San Francisco v. *Anderson,* 103 Cal. 69;

Germania Trust Co. v. *San Francisco,* 128 Cal. 589;
Bank of California v. *San Francisco,* 142 Cal. 276.

That the rule so announced by the Supreme Court of California, and accepted by her Legislature, is sound, under her system of taxation, can hardly be open to question. We are aware there are numerous decisions rendered in the interpretation of other tax laws, holding that a share of stock is separate and distinct property which may be so treated for purposes of taxation, and which is not taxed in the taxation of corporate property. But the question here is not what rule would be adopted by another Court were the same questions submitted to it. The question is, what construction has been placed upon her revenue laws by the Courts of California? Is it possible, under her tax laws, so interpreted and enforced, to avoid a discrimination against national bank shareholders, by an assessment of the stock of such banks and an assessment of the property of competing corporations?

Under the California system, all the property of California corporations is assessed, including their franchises. It is frequently the case that the market value of the stock of a corporation is greatly in excess of the value of its property, other than its franchise. This fact was called to the attention of the State Court, which recognized the force of this suggestion, and held the Constitution and laws of the State require the as-

sessment and taxation of the franchise of the corporation, and that its value, for purpose of such assessment and taxation, was properly ascertained by deducting from the market value of its stock the value of its corporate property, and assessing the remainder as franchise.

Thus: Let us assume that a state bank possesses $5,000,000 worth of assessable property other than franchise. Its stock has an aggregate market value of $6,000,000. The assessable value of its franchise is properly ascertained by deducting $5,000,000, the value of its assessable property, other than franchise, from the value of its stock, $6,000,000, and assessing the balance, $1,000,000, as the value of its franchise.

San Jose Gas Co. v. *January,* 57 Cal. 614;
S. V. W. W. v. *Schottler,* 62 Cal. 100-112;
Ottawa Glass Co. v. *McCalet,* 81 Ill. 556;
Burke v. *Badlam,* 57 Cal. 594;
Bank of California v. *San Francisco,* 142 Cal. 276.

The case of *Bank of California* v. *San Francisco,* 142 Cal. 276, decided since the decision of the case of *Nevada National Bank* v. *Dodge,* 119 Fed. Rep. 57, reaffirms the rule announced in *Burke* v. *Badlam,* 57 Cal. 594, and may be considered as settling the interpretation of the revenue laws of California in favor of the assessment and taxation of the franchises of all domestic corporations. That case also affirms the system

by which the value of such franchises may be ascertained by the Assessor, which contemplates the deduction from the agregate market value of its stock of the value of its taxable property other than franchise and the assessment of the remainder as franchise value. In this way the total value of the shares of the corporation is taxed through the taxation of the property of the corporation which constitutes such value. The Court states it thus:

"It is clear that if the laws of this State properly ex-
" press the intention that everything that gives value to
" the shares of a corporation shall be assessed as prop-
" erty of the corporation, the true value of those shares
" is a most important element in determining the value
" of such property."

Under the California system of taxation of corporations, therefore, the full market value of the stock of such corporations is assessed, by an assessment of their entire property, including their franchise. Where such property is situated in another State, and is not subject to the taxing jurisdiction of the State, the same end is attained by an assessment of the stock.

S. F. v. *Fry,* 63 Cal. 470.

Two Lines of Decisions.

There is a further distinction which should be noted in a discussion of this question, and it has reference to the two general classes of legislation through which the different States have attempted the taxation of the property of national banks. It has been the mistaken

policy of some States to place the burden directly upon the tangible property of the bank, and, in other States, the tax has been very properly assessed upon the shares of stock, with the property of the bank as the basis of valuation. This diversity has given rise to two lines of decisions in the Supreme Court of the United States, one of which has its culmination in *Owensboro National Bank* v. *Owensboro,* 173 U. S. 664, and the other is represented by *Palmer* v. *McMahon,* 133 U. S. 660; *Bank of Redemption* v. *Boston,* 125 U. S. 60; *Davenport National Bank* v. *Davenport,* 123 U. S. 83; and *Mercantile Bank* v. *New York,* 121 U. S. 138. The Owensboro case drew into question the validity of a statute of Kentucky which imposed a *direct* tax upon the corporate property and franchise of the national bank, without regard to the shares of stock issued by it. The tax was upon the property and not upon the shares of stock. The tax was resisted upon two principal grounds: 1. That the taxes complained of were unlawful, because they were not laid on the shares of stock in the names of the shareholders, but were actually imposed upon the property of the bank, contrary to the Act of Congress; 2. That if the taxes were not on the property of the bank, then they were imposed on its franchise or right to do business, derived from the laws of the United States.

The act of Congress confers power upon the States, not to tax the property or franchise of a national bank, but only to tax the shares of such banks in the hands of

the shareholders. Whether there is an equivalency between the taxation of the properties of a national bank and the taxation of its stock, is a question of valuation only, since it is not pretended that the assessment of the shares is in fact the assessment of the bank property. But in ascertaining the *valuation* at which the stock shall be assessed the net assets of the bank may be determined to the end that the actual value of the stock may be ascertained. That the value of the stock is dependent upon the assets of the bank, is admitted by the Act of Congress in providing for a deduction from the value of the shares, of the value of the real estate of the bank.

The Owensboro case was decided in this conclusion:

"The proposition then comes to this: Nothing but " the shares of stock in the hands of the shareholders of " a national bank can be taxed, except the real estate of " the bank. The taxes which are here resisted are not " taxes levied upon the shares of stock in the names of " the stockholders, but are taxes levied on the franchise " or intangible property of the corporation. Thus, " bringing the two conclusions together, there would " seem to be no escape in reason from the proposition " that the taxing law of the State of Kentucky is be- " yond the power conferred by the Act of Congress, " and is therefore void for repugnancy to such Act."

The Act of 1899 is open to no such criticism. It follows the requirement of the Act of Congress and imposes the tax, not upon the franchise or intangible property of the bank, but upon the shares of the bank in the hands of its shareholders.

This may be considered the vital point of attack upon the law. And in the decision of this question we are concerned most with an attempt to make the position which we occupy thoroughly understood by the Court.

As has been asserted the question is *not* whether an assessment of the property of a national bank is the equivalent, in fact and law, of the assessment of the shares of stock of such bank in the hands of its shareholders. The Supreme Court of the United States, in the Owensboro and kindred cases, has held that it is not equivalent. So, also, has the Supreme Court of California held, in *First National Bank* v. *San Francisco,* 129 Cal. 94, and like cases. The Act of 1899 does not assume to tax the property of national banks upon the theory that such a tax would be the equivalent of a tax upon their shares. This Act does not place a tax upon such property at all, but it does place a tax upon the shares of stock of such banks. So that we are not here concerned with the question considered in the Owensboro case. We are not called upon to maintain the proposition that a tax upon the possessions of a national bank is the same as a tax upon its shares. We impose no such tax. Our tax is levied upon the shares of stock. Let this be understood.

But California does not levy a direct tax upon the shares of stock of California corporations the property of which is assessed and taxed in California. It is on this fact that the attack is based. Not that we do not tax the shares of stock of national banks directly, but that we tax the shares of stock of California corpora-

tions indirectly. If the shares of stock of local corporations escape taxation under the California system, it may not be doubted that no tax can lawfully be levied upon shares of stock of national banks. So that the real question here is: Are the shares of stock of competing California corporations taxed under the California system?

The real question therefore is whether, under the California system, the assessment and taxation of all the property of California corporations is equivalent to the assessment and taxation of the shares of stock of California corporations. Not whether the assessment and taxation of the property of a national bank is equivalent to the assessment and taxation of its shares. Not whether the assessment and taxation of the property of a California corporation is equivalent to the assessment and taxation of the shares of stock of a national bank. But whether the assessment and taxation of all the property of a California corporation is the equivalent of the taxation of the shares of stock of such corporation.

In short, whether the statement contained in section 3608, that shares of stock possess no intrinsic value over and above the actual value of the property which they stand for and represent, and that the assessment and taxation of such shares, and also of the corporate property, would be double taxation, are legal lies; or whether those declarations and the holdings of the State Supreme Court in support thereof, are true under the revenue laws of California.

It certainly cannot be successfully contended that California must subject the corporate property within her taxing jurisdiction to double taxation in order to tax national bank stock but once. The question, then, is whether California has provided for a tax upon the shares of stock of her corporations; and this brings us to the question whether, *under her system as interpreted by her Courts,* the assessment and taxation of all the corporate property is equivalent to the assessment and taxation of the shares of stock of such corporations. And, as an interpretation of the revenue laws of a State by its own Courts is binding upon a Federal Court, we are concerned here only with the views of the Supreme Court of California upon this point. It may be said, however, that the Supreme Court of that State is not alone in the views expressed, very eminent authority in sister States having taken the same view.

Rice v. *National Bank,* 23 Minn. 280;
Commrs. v. *National Bank,* 48 Md. 117;
Lackawanna v. *National Bank,* 94 Pa. St. 221;
Rosenberg v. *Texas,* 67 Tex. 578;
Gordon v. *Mayor, etc.,* 5 Till. 231;
Blythe v. *Brannin,* 3 Zabr. 484;
Johnson v. *Commonwealth,* 7 Dana, 342;
Tax Cases, 12 G. & Johns. 117;
Smith v. *Burley,* 9 N. H. 423;
Williams v. *Weaver,* 75 N. Y. 31;
New Haven v. *Bank,* 31 Conn. 106.

And there is authority of equal respectability holding to the contrary. But we are here concerned only with the views which the Supreme Court of California has taken on this question. For this is a question, we repeat, whether, under her revenue system, the assessment of all corporate property is equivalent to the assessment of the shares of the corporation. And in passing upon that question the Supreme Court of that State has held, in so many terms, that such equivalency exists—that it exists to such an extent as to leave an assessment of both the corporate property and the shares open to the objection that the same property is thereby taxed twice.

Burke v. *Badlam,* 57 Cal. 601;
San Francisco v. *Anderson,* 103 Cal. 70, 71;
Germania Trust Co. v. *San Francisco,* 128 Cal. 595;
People v. *National Bank,* 123 Cal. 53-60;
S. V. W. W. v. *Schottler,* 62 Cal. 69;
San Francisco v. *Fry,* 63 Cal. 470;
Bank of California v. *San Francisco,* 142 Cal. 276.

It is not necessary here to restate the holding of those cases. They are without conflict upon the principle that the assessment of the corporate property and also the stock of the corporation would be the taxation of the same property twice, since the taxation of the corporate property is the equivalent, in fact and in law, of the taxation of the stock. Judge Sawyer, in *San Fran-*

cisco v. *Mackay*, 21 Fed. 539, 540; 10 Saw. 302, stated the conclusion thus:

"The Supreme Court of the State, in *Burke* v. *Bad-*
" *lam*, 57 Cal. 594, held that the Constitution of the
" State does not authorize or require, but, on the con-
" trary, forbids, a double taxation of property; that it
" would be double taxation to tax all the property of a
" corporation to the corporation, and then assess to each
" stockholder the shares of stock in it held by him.
" This decision by the State Supreme Court, giving a
" construction to the State Constitution, is controlling
" in this Court. The corporation is the immediate pri-
" mary owner of all the property of the corporation,
" the right of the stockholders in it being only deriva-
" tive and secondary. The Constitution and laws re-
" quire all property to be assessed and taxed to the
" owner, and the legal presumption is, as held in the
" case cited, nothing to the contrary appearing, that all
" property of a corporation has been assessed to the
" corporation. * * * That being so, the assess-
" ment of the stock in question to defendant is, as to the
" amount assessed, a second or double assessment of the
" same property, and, as such, void."

Nor do we believe that the case of *Miller* v. *Heilbron*, 58 Cal. 133, can be successfully relied upon as overruling the authority of *Burke* v. *Badlam, supra.* As the Supreme Court of California has said, in *McHenry* v. *Downer*, 116 Cal. 28, the case of *Miller* v. *Heilbron*, although decided a month or two after the decision in *Burke* v. *Badlam*, arose on a state of facts and under a statute in existence prior to those considered in *Burke* v. *Badlam*. In fact, the Act, in the in-

terpretation of which *Miller* v. *Heilbron* was rendered, was repealed at the same time the Act considered in *Burke* v. *Badlam* was enacted. (Stats. 1881, p. 56.)

Miller v. *Heilbron is not, therefore, on this point, an interpretation of any statute now in existence in this State, or under the authority of which either competing moneyed capital or national bank stock is being assessed.* It is the attempted interpretation of a statute which was repealed twenty years ago. *Burke* v. *Badlam,* on the contrary, is the interpretation of a statute which was then, has ever since been, and is now, a substantive law of this State.

Miller v. *Heilbron* throws no light on any existing law of this State, and cannot be said to be in conflict with *Burke* v. *Badlam,* which contains an exposition of existing and different laws.

In addition thereto, *Burke* v. *Badlam* is the expressed views of Justices Ross, Sharpstein, McKee, Thornton, McKinstry, and Myrick, with Morrison, C. J., concurring on a different point, while *Miller* v. *Heilbron,* if in point at all upon this question, is the views only of McKinstry, Thornton, and Sharpstein. The views of these Justices in Banc are not controlling, and the judgment must have failed of affirmance had not Justice Ross concurred therein upon another point mentioned in the opinion of Justice McKinstry. Mr. Justice Ross did not concur in the views expressed by Justice McKinstry so far as there was any possible conflict between those views and those expressed in *Burke* v. *Badlam.*

But whatever doubt may have existed as to the influence of the minority opinion in *Miller* v. *Heilbron,* on the decision of the Court in *Burke* v. *Badlam,* has been definitely removed by the ruling of the Supreme Court of California in *Bank of California* v. *San Francisco,* 142 Cal. 276, 285, in reviewing and affirming the ruling in *Burke* v. *Badlam.* The Court says:

"It was held that the language of the Constitution "clearly forbade double taxation; that the Legislature "had the right thereunder to say that all the property "of the corporation should be assessed to the corpora- "tion, and the same property should not again be as- "sessed for the same tax; that the 'property' of the "corporation included its franchise and everything else "evidenced by the certificates of stock; that while the "share of each stockholder was undoubtedly property, "it was an interest in the very property held by the "corporation and nothing more; and that when all the "property of the corporation, including its franchise, "was assessed, which it was to be presumed would be "done by the assessor in obedience to the requirements "of the law, any for the assessment of the shares to the "individual stockholders would be double taxation." (*People* v. *Badlam,* 57 Cal. 594.)

The rule announced in *Burke* v. *Badlam* must, therefore, be considered the rule of assessment in this State of the property and shares of stock of California corporations.

It follows that there is an equivalency, under our revenue system, between the assessment of the corporate property and the assessment of the stock; that the taxa-

tion of the corporate property is the taxation of the stock, and that the taxation of both the corporate property and the stock would be the taxation of the same property twice, and double taxation.

The taxation of all the corporate property being equivalent—the same as—the taxation of all the shares of stock, no stock of California corporations escapes taxation. The contention that there is a discrimination against national banks because the shares of stock of State banks is not taxed is, therefore, based upon a falsehood in law and in fact.

It is the holding in the Owensboro case that the taxation of the property of a national bank, including its franchise, is not the same as the taxation of the shares of stock of such bank. It is the holding that the Act of Congress allows the latter and forbids the former. It is the holding that the law of Kentucky, assuming to place a tax upon the property of the bank, and not upon its shares, is void for that reason. But it was not held therein, nor could it have been, that the taxation of all the property of a State bank may not be the same as the taxation of the stock of such bank.

In the language of Mr. Justice Miller, speaking for the Court in *Davenport Bank* v. *Davenport,* 123 U. S. 85:

"It has never been held by this Court that the States "should abandon systems of taxation of their own "banks, or of money in the hands of other corporations, "which they may think the most wise and efficient "modes of taxing their own corporate organizations,

" in order to make that taxation conform to the system " of taxing the national banks upon these shares of their " stock in the hands of their owners. All that has ever " been held to be necessary is, that the system of State " taxation of its own citizens, of its own banks, and of " its own corporations, shall not work a discrimination " unfavorable to the holders of the shares of the na- " tional banks. Nor does the Act of Congress require " anything more than this; neither its language nor its " purpose can be construed to go any farther. Within " these limits, the manner of assessing and collecting " all taxes by the States is uncontrolled by Act of Con- " gress."

Davenport Bank v. *Davenport,* 123 U. S. 85, is a case in which the contention was advanced that a valid assessment of national bank stock is possible only when a similar assessment is made of State bank stock. Justice Miller states the contention thus:

"The proposition of counsel seems to be, that the " capital of savings banks can be taxed by the State in " no other way than by an assessment upon the shares " of that capital held by individuals, because, under the " Act, the capital of the national banks can only be " taxed in that way. It is strongly urged that in no " other mode than by taxing the stockholders of each " and all the banks can a perfect equality of taxation " be obtained."

And it is held that the State is not required to abandon its own system of taxing the capital of corporations instead of their stock in order to affect taxation of national bank stock.

This case was in line with *Mercantile Bank* v. *New York,* 121 U. S. 138-160, wherein it was held that a tax levied upon the capital and franchise of State trust companies and savings banks will satisfy the requirements of the Act of Congress, notwithstanding the stock of such corporations is not directly taxed.

See, also:

Palmer v. *McMahon,* 133 U. S. 660;
Bank of Redemption v. *Boston,* 125 U. S. 60.

These cases are cited and approved by Mr. Justice White, in *Owensboro National Bank* v. *Owensboro.* They are cited for the purpose of pointing the distinction between that class of cases in which it is held *that the power conferred by Congress does not admit of the taxation of corporate property of national banks directly,* and that class of cases which hold that *there is no discrimination against national bank stock when the corporate property of State banks is taxed instead of the shares of stock of such banks.*

When, therefore, it is established, as it is in this State, that all the corporate property of State corporations is taxed, and that, under this tax system, the taxation of such property is the equivalent of the taxation of all the property of such corporations, it necessarily follows that there is no discrimination against national bank shares under a law which places the tax upon such shares.

Equivalency in Fact.

That there is an equivalency in fact, as well as in law, is demonstrated by the following statement. Through this statement a comparison is presented by the hypothetic assessment of the assets of the San Francisco National Bank, appellant, as a State bank. The figures are taken from the agreed facts.

ASSETS.

1. Loans and discounts	$1,382,330 39
2. Overdrafts	4,293 26
3. United States bonds	50,000 00
4. Premiums on United States bonds	4,800 00
5. Cash on hand and due from banks	390,915 13
6. Redemption fund (5 %)	2,250 00
Total assets	$1,840,038 78

LIABILITIES.

8. Capital stock paid up	$ 500,000 00
9. Undivided profits	81,911 32
10. Deposits	1,258,127 46
Total liabilities	$1,840,038 78

ASSESSED AS A STATE BANK.

Solvent credits, item 1	$1,382,330 39
Solvent credits, item 6	2,250 00
Solvent credits, item 2	4,293 26
Total solvent credits	$1,388,873 65
Less debts due residents, item 10	1,258,127 46
Assessable balance	$ 130,746 19
Cash on hand, item 5	390,915 13
Franchise (nominal)	10,000 00
Total assessment	$ 531,661 32

Or $106.33 a share.

ASSESSED AS A NATIONAL BANK.

Capital paid in, item 8	$ 500,000 00
Undivided profit, item 9	81,911 32
Total book value of stock	$ 581,911 32
Or $116.38 per share.	
Less exemption—	
United States bonds, item 3	$ 50,000 00
Premium, item 4	4,800 00
Total exemption	$ 54,800 00
Assessment	$ 527,111 32
Net assessment, $105.32 a share.	
Actually assessed at $104.36 a share, or	$ 521,000 00
Balance in favor of assessment as a National Bank	$ 4,550 00

Thus it is made to appear that the practical application of the revenue laws of California to the assets of a National Bank in the assessment of such assets as if held by a State Bank would result in a discrimination in favor of and not against the National Bank.

The Circuit Court of Appeals in *Nevada National Bank* v. *Dodge,* 119 Fed. Rep. 51, correctly applies the law on this series of contentions as follows:

"We are unable to see that, under the system of "assessment provided for in the California statute, "shares in national banking associations are valued "higher in proportion to their real value than moneyed "or competing capital of local banking corporations. "The mode of assessing such shares directly to the "owners thereof is certainly different from the indirect "method of assessing the interest of stockholders of

"local banking corporations in the property of such "corporations; but, under the statute as we interpret it, "all property which, if owned by a local banking cor- "poration or citizen of the State, would be exempt "from taxation under the State law, is, when owned by "a national banking association, to be deducted from "the total value of its shares in ascertaining the value "of such shares for the purpose of assessment. Under "this mode of proceeding no greater burden of taxa- "tion is imposed upon capital invested in national "banking associations than is placed upon competing "moneyed capital in the hands of individual citizens "or local banking corporations; and, this being so, "there is no conflict between the statute of the State "and section 5219 of the Revised Statutes (U. S. "Comp. Stats. 1901, p. 3502)."

At complainant's request there was inserted in the Statement of Agreed Facts upon which this matter was heard and determined below, a tabulation of the resources of the Bank of California and a list of the valuations at which the properties of said bank were assessed for purposes of taxation. From these respective lists it appears that the properties of the Bank of California were valued by the assessor at less than their actual value. We are aware of no rule of law or decided case through which it has been declared that an assessment of particular property can be avoided by a showing that certain other property has been undervalued. If the assessor, in the assessment of the property of the Bank of California, has undervalued that property in disregard of the requirements of the Con-

stitution and statutes of California directing him to assess it "at its full cash value" (sec. 3627, Pol. Code of California), that fact will constitute no defense to the collection of a tax on property which has been assessed "at its full cash value." The revenue laws of the State require the assessment of all property "at its full cash value" without discrimination. As we have seen, they require the assessment of the franchises of local banking corporations at a value ascertained in such a manner as will make the aggregate value of the property and franchise of such corporations equivalent to the aggregate market value of their shares of stock.

Bank of California v. *San Francisco,* 142 Cal. 276;

Burke v. *Badlam,* 57 Cal. 594.

If these laws are impartially administered no discrimination can result against national banking associations through the direct taxation of their shares. As this Court has repeatedly affirmed:

"Absolute equality and uniformity are seldom, if "ever, attainable; the diversity of human judgments, "and the uncertainty attending the human evidence, "preclude the possibility of its attainment. Intelligent "men differ as to the value of most common things be-"fore them—of animals, houses and lands in constant "use. The most that can be expected from wise legis-"lation is an approximation to the desirable end; and "the requirement of equality and uniformity found in "the Constitutions of some of the States is complied

"with when designed and manifest departures from "the rule are avoided."

Stanley v. *Supervisors,* 121 U. S. 550;
Bank v. *Kimball,* 103 U. S. 722;
Supervisors v. *Stanley,* 105 U. S. 305;
Bank v. *Perea,* 147 U. S. 67.

It is not asserted that any designed departure was made by the Assessor from the rule prescribed by the statute in his estimate of the value of the properties of the Bank of California. Neither is it alleged or proved that any general rule of conduct was adopted by him in accordance with which he has designedly and intentionally undervalued other competing moneyed capital. And the fact that he may have done so in the single instance of the Bank of California cannot be considered sufficient evidence of an unlawful discrimination. It is not alleged that any such discrimination was practiced by the Assessor or that any such discrimination exists other than such as, in appellant's view, must result from the operation of the law. That no discrimination was intended or is countenanced by the statute of California we believe is demonstrated by the Circuit Court of Appeals in *Nevada National Bank* v. *Dodge,* 119 Fed. Rep. 57, and by the authorities cited in this brief.

"Mere inequalities in taxation will not vitiate a tax, "if they are accidental and unintentional. They must "occur under any system of taxation, and especially "under that in force in this State in which every civil

" district and ward has its own assessor. There will, " of necessity, be many instances in which property will " be assessed at more than its value, and more, perhaps, " at which it will be assessed at less than its value. " These errors and discrepancies will not vitiate the " tax. They are inevitable."

Railway Co. v. *Guenther,* 19 Fed. Rep. 302; *Cummings* v. *Bank,* 101 U. S. 157.

II.

Deductions of "Property Exempt by Law."

It was considered possible to assess the stock of national banks without an enabling act, on the theory that the property of such institutions, other than real estate, was not taxable. The attempt was made in *McHenry* v. *Downer,* 116 Cal. 20, and the Supreme Court of the State held that, in the absence of legislation designed to accomplish the assessment of national bank stock, no such assessment could be made. It held further that there was a discrimination against national bank stock, in an assessment of that stock when the corporate property of State corporations was assessed, and not the stock. In short, under the laws of the State, as they then existed, there was not an equivalency between the assessment of the stock of national banks and the assessment of the corporate property of State corporations. It was not questioned by the Court, however, but that such equivalency could be made to exist. It was held that a discrimination was possible against national

banks, because in the estimation of the value of its shares no deduction was allowed on account of United States bonds and other non-taxable securities, which were not assessed when owned by State corporations.

The point may be illustrated thus: A State bank owns $1,000,000 worth of United States bonds and bonds of *quasi* public corporations, which are not taxable. Its entire corporate property, including such bonds and excluding its franchise, is valued at $5,000,000. The market value of its stock aggregates $6,000,000. Its franchise is valued, therefore at $1,000,000. It will be assessed, therefore, for $1,000,000 on its franchise and $5,000,000 tangible property, less the non-assessable bonds, worth $1,000,000. Its entire assessment, therefore, will be $5,000,000.

Now, in the case of a national bank owning similar property, under the law as it existed when *McHenry* v. *Downer, supra,* was decided, no deduction from the value of its property, which would be used in estimating the value of its shares, would be allowed on account of United States bonds. As had been decided in *Van Allen* v. *Assessors,* 3 Wall. 573, and kindred cases, such bonds should be included in the valuation of such stock. This was the result: The stockholders of a national bank holding $1,000,000 in United States bonds, the stock of which had an aggregate market value of $6,000,000, would be assessed for $6,000,000, less the value of the bank's real estate only. Here, then, there would be a discrimination against such stockholders in the assessment of the United States bonds held by the

bank and the exemption of such bonds, when held by a State bank.

In the adoption of the Act of March 14, 1899, however, the Legislature has made provisions whereby this discrimination is removed, by allowing the same exemptions to the national banks as have been enjoyed by State banks. It is therein provided:

"In making such assessment to each stockholder, " there shall be deducted from the value of his shares " of stock such sum as in the same proportion to such " value as the total value of its real estate and property " exempt by law from taxation bears to the whole value " of all the shares of capital stock in said national " bank."

The Assessor is authorized and required, therefore, to deduct from the value of the share of stock, such sum as is in the same proportion to such value as the total value of its real estate and property exempt by law from taxation bears to the whole value of all the shares. This the Assessor has done in this case. The method pursued will be found set forth in appellant's bill. It appears therefrom that the Assessor permitted a deduction on account of United States bonds, deposited to secure circulation, on account of United States bonds on hand, and on account of stocks and bonds of California corporations exempt under *Germania Trust Co.* v. *S. F.*, 128 Cal. 589. The total deduction made was divided by 30,000, the number of shares issued by appellant. This sum was deducted from the market value of appellant's stock, and the balance was assessed as the value of each share.

Those properties, therefore, which are treated as exempt in the assessment of the properties of State banks, are also treated as exempt in an estimation of the value of the shares of national banks. Absolute equality is maintained thereby, and any possible discrimination on account of such exemptions is avoided.

Solicitor for appellant seeks to give this provision in the Act of 1899 such an interpretation as would entirely nullify and defeat its purpose. The deduction allowed on account of "property exempt by law," he would have the Court so interpret as to require a deduction of all the properties of the national bank, thereby leaving no value in the share to be assessed. Such a construction would lead to a manifest absurdity. Such a construction would create a contradiction in terms, requiring the assessment of the stock, and providing a means for ascertaining its value, which would relieve it entirely from such assessment. No such intent can be attributed to any Legislature in the presence of any possible construction which will give effect to the language used. Where a statute is fairly susceptible of two constructions—one leading inevitably to mischief or absurdity, and the other consistent with justice, sound sense and wise policy—the former should be rejected and the latter adopted.

In re Mitchell, 120 Cal. 384-386;
Jacobs v. *Supervisors,* 100 Cal. 127;
Sedgwick on Stat. and Const. Law, 312.

When, therefore, it becomes manifest, from a review of the revenue laws of California, as construed by her Courts, that the deductions to be allowed, under this section of the Act, were to be so allowed for the purpose of avoiding a possible discrimination against national banks, it is fair to consider the exemptions permitted State banks in order to determine what exemptions are intended to be allowed national bank stockholders. When the purpose and intent of the Act is kept in mind, no difficulty is experienced in giving to this provision a rational and correct interpretation.

Nor is appellant's solicitor correct in the assumption that all the property of national banks is exempt from taxation, except their real estate. It is undoubtedly true that direct taxation of the property of a national bank, other than its real estate, is not permissible. But it does not follow that such property cannot be taxed for that reason. On the contrary, Congress has seen fit to permit the taxation of such property through the medium of the shares. In the valuation of the shares each and every element of property possessed by the national bank is to be considered, including United States bonds. The property of such banks is not exempt by law, therefore, from taxation. The Act of 1899 has manifest reference to such property as is exempt when held by State banks, and such property may include United States bonds and stocks and bonds of California corporations. By the deduction of such property from the property assessed to State banks, and

from the value of the shares of national banks, absolute equality is created in the taxation of both.

Nevada National Bank v. *Dodge,* 119 Fed. Rep. 57.

It is thus evident both by the statutes and decisions of this State, that the system of taxation on its face works no discrimination against the national bank shareholders, and that it was the thought and intent of the State Legislature that the taxation of the property and the taxation of the shares was one and the same.

The purpose of this method of taxation was to avoid what the Supreme Court of the State had declared to be double taxation. And in the case of *Hepburn* v. *School Directors,* 23 Wall. 480, it is held that the exemption of all mortgages, judgments, recognizances, and monies owing upon articles of agreement for sale of real estate from taxation to prevent a double burden, by the taxation both of the property and the secured debt was a justifiable exemption and did not discriminate against shareholders of national bank stock.

In conclusion, it may not be improper to say that the Act of March 14, 1899, marks the last attempt on the part of the State of California to avail itself of the permission given by the Congress to the States to subject the shares of national banking associations to their just share of the burdens of taxation. Several previous attempts to accomplish this to the satisfaction of all legal limitations have been made without success. The present law we confidently believe meets all requirements

and must be considered, as in fact it is, a conscientious attempt to accord to the holders of national bank stock the full measure of protection to which they are entitled. Certainly the Act bears upon its face every indication of such a purpose, and its administration in harmony with the revenue laws of the State can only lead to an indiscriminate taxation of all such property. The judgment of the Circuit Court of Appeals was reached after full argument and mature consideration, and we respectfully contend should be affirmed.

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